MAY 31 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1949.

No. [redacted]102

JAMES A. SULLIVAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF NEW YORK.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York and for Stay of Execution, and Supporting Brief.

FRANCIS A. MCGURK,
Attorney for Petitioner,
42 Broadway,
New York City.

THE REPORTER COMPANY, INC., New York City—1950

Index.

	Page
Constitutions	ii
Statutes	iii
Table of Cases Cited	iv
Other Authorities	vi
Petition for Writ of Certiorari	1
Statement of Case	1
Jurisdiction	4
Statutes Involved	5
Questions Presented	6
Reasons Relied Upon for Allowance of the Writ	7
Conclusion	8
Brief in Support of Petition	9
Opinions Below	9
Jurisdiction	9
Specifications of Error	9
Summary of Argument	11
Argument	14
I. The Trial Court lacked jurisdiction because of disqualification of the Trial Judge by §14 of the Judiciary Law	14
A. Importance of the question	14
B. Exhaustion by petitioner of State remedies	14
C. Lack of jurisdiction in the County Court in this case	14
D. Legal effect of retention of jurisdiction	16
E. Right to trial by a competent Court was abridged	17
II. The judgment of conviction rests upon perjury, coerced and knowingly used, and should not be permitted to stand	18

Page

A. Importance of the question 18

B. Perjury was committed by the witness Balog 18

C. Perjury was coerced and knowingly used by the State 19

III. Balog, chief witness of the State, was impeached in violation of the statutes, and is also an uncorroborated accomplice, all of which leaves the verdict unsupported by evidence on the charges of filing and uttering, and goes to his credibility on all counts of the indictment 21

A. Importance of the question 21

B. There is no substantive evidence of guilt of filing and uttering under counts first and third 21

C. The impeachment in this case was in violation of the statutory methods prescribed therefor 22

D. Lack of due process and denial of equal protection of the laws because of impeachment 23

E. Denial of the equal protection of the laws, §399 of the Code of Criminal Procedure 23

Conclusion 25

CITATIONS.

	Page
U. S. Constitution, 14th Amendment, §1	4-7, 10-11, 16-17, 21, 23
N. Y. Constitution, Article 6, §11	17
N. Y. Constitution, Article 1, §6	21

STATUTES.

U. S. C. A., Title 28, §1257 (3)	4
U. S. C. A., Title 28, §455	14
Code of Criminal Procedure, §8-a	4-7, 10, 13, 22-24
Code of Criminal Procedure, §399	6, 7, 11, 13, 24
Code of Criminal Procedure, §39	14
County Law, §230 (3)	2, 15
County Law, §230 (1)	2, 15
County Law, §200 (1)	2
County Law, §200 (4)	17
County Law, §202	17
Civil Practice Act, §343-a	4-7, 10, 13, 22-24
N. Y. Laws 1847, Chapter 280, §81	15
Penal Law, §2051	2
Penal Law, §440	2
Penal Law, §887	2
Penal Law, §881	2
Penal Law, §1620 (1)	21
Penal Law, §1620-a	21
Penal Law, §1622	21
Penal Law, §1624	21
Penal Law, §1626	21
Penal Law, §1627	21
Penal Law, §1627-a	21
Revised Statutes (N. Y., 4th ed.), 1852, v. 3, p. 463, §8	15
Reviser's Notes to N. Y. Laws in v. 3 R. S. (N. Y. 1828-1835), p. 694, §2	15

CASES.

	Page
Ashcraft v. Tennessee, 322 U. S. 143	23
Bullard v. Pearsall, 53 N. Y. 230	5, 23
Becker v. Koch, 104 N. Y. 394	5
Baltimore Mail S. S. Corp. v. Fawcett, 269 N. Y. 379	15
Chambers v. Florida, 309 U. S. 227	23
Cassel v. Texas, decided April 24, 1950	17
Conrad v. Griffey, 52 U. S. 480	22
Crawford v. Nilan, 289 N. Y. 444	5
Darling v. Pierce, 15 Hun 542	16
Darr v. Burford, 339 U. S. 200	14
Davis v. Seaward, 85 Misc. 210	17
Ex Parte Virginia, 100 U. S. 339	17
Eugenie Loeb v. Nassau El. R. R., 240 App. Div. 912	15
Ex Parte Hawk, 321 U. S. 114	14
Ex Parte Reid, 100 U. S. 13	15
Fellows v. Mayor, 8 Hun 484	17
Frank v. Magnum, 237 U. S. 309	15
Hanrahan v. N. Y. Edison Co., 238 N. Y. 194	22
Hogan v. General Sessions, 296 N. Y. 1	14
Hubbell v. Harbeck, 54 Hun 147	16
Hysler v. Florida, 315 U. S. 411	14, 21
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278	4, 17
Johnson v. Zerbst, 304 U. S. 458	14
Keefe v. Third Nat. Bk. of Syracuse, 177 N. Y. 305	15, 17
Lewis v. Branthwaite, 2 B. & Ad. 437	16
McLaren v. Charrier, 5 Paige Ch. 530	15
Matter of Knickerbocker T. Corp. v. Sheila Lynn Inc., 172 Misc. 1015, affd. 259 App. Div. 992	16
McMaster v. Gould, 240 N. Y. 379	16
Matter of City of Buffalo, 139 N. Y. 422	16
Moore v. Dempsey, 261 U. S. 86	16

Page

Mooney v. Holohan, 294 U. S. 103 21
Malinski v. New York, 324 U. S. 401 23
Matter of Roge v. Valentine, 280 N. Y. 268 ..... 5, 23
Neal v. Delaware, 103 U. S. 370 17
Oakley v. Aspinwall, 3 N. Y. 547 15
Palko v. Connecticut, 302 U. S. 319 16
Paterno v. Lyons, 334 U. S. 314 14
Pennenkamp v. Florida, 328 U. S. 331 23
Pennoyer v. Neff, 95 U. S. 714 16
People v. Bork, 96 N. Y. 188 16
People v. Edwards, 282 N. Y. 413 22
People v. Gillette, 126 App. Div. 665 20
People v. Glass, 191 App. Div. 483 21
People v. Hagedorny, 272 App. Div. 830 22
People v. Haas, 105 App. Div. 119 ..... 15, 16
People v. Jung Hing, 212 N. Y. 393 5
People v. Katz, 209 N. Y. 311 ..... 5, 22
People v. Kress, 284 N. Y. 452 25
People v. Markan, 123 Misc. 689 20
People v. Nuzzo, 294 N. Y. 227 25
People v. O'Neil, 109 N. Y. 251 ..... 22, 24, 25
People v. Purtell, 243 N. Y. 273 5
People v. Patrick, 183 N. Y. 52 16
People v. Rathbun, 21 Wend. 509 17
People v. Romano, 279 N. Y. 392 5
People v. Robinson, 273 N. Y. 438 ..... 5, 23
People v. Sellinger, 265 N. Y. 149 22
People v. Sullivan, 275 App. Div. 956 9
People v. Sullivan, 300 N. Y. 696 9
People v. Sullivan, 309 N. Y. 739 9
People v. Swersky, 216 N. Y. 471 25
People ex rel. Battista v. Christian, 249 N. Y. 314 17
People ex rel. Childs v. Extrady, Trial Term, 228 N. Y. 463 16
People ex rel. Pond v. Trustees, 4 App. Div. 399 .... 15, 16

Page

People ex rel. Roe v. Suffolk Com. Pleas, 18 Wend. 550 15
People ex rel. Wachowicz v. Martin, 293 N. Y. 361 14
Pyle v. Kansas, 317 U. S. 213 21
Robb v. Hackley, 23 Wend. 50 22
Spielman Motor Co. v. Dodge, 295 U. S. 89 17
Schneiderman v. U. S., 320 U. S. 118 16
Screws v. U. S., 325 U. S. 91 4
Snyder v. Massachusetts, 291 U. S. 97 16
Sharkey v. Thurston, 268 N. Y. 123 ..... 14, 15, 16, 17
Shea v. Export S. S. Corp., 253 N. Y. 17 15
Ten Eick v. Simpson, 11 Paige Ch. 177 16
Thellusson v. Rendlesham, 7 H. L. Cas. 429 16
Twining v. New Jersey, 211 U. S. 78 16
U. S. v. Norris, 300 U. S. 564 20
Virginia v. Rives, 100 U. S. 313 17
Whitney v. Post, 8 Paige Ch. 36 16
Wigand v. Dejonge, 8 Abb. N. C. (N. Y.) 260 16
Wicks v. Monihan, 130 N. Y. 232 16
Windsor v. McVeigh, 93 U. S. 274 15
Yick Wo v. Hopkins, 118 U. S. 356 17
Zambetti v. Garton, 113 N. Y. Sup. 804 16

OTHER AUTHORITIES.

N. Y. Legislative Manual, 1945, p. 658 2
N. Y. Legislative Manual, 1946, pp. 1005, 1014 ..... 2, 15
N. Y. Legislative Manual, 1947, p. 993 ..... 2, 15
56 Yale Law Journal 605, 624 (Apl., 1947) 16
15 California Law Review 263 (Mar., 1927) 16
Wigmore on Evidence, 3d ed., §§1128, 1129 ..... 20, 23

Supreme Court of the United States

OCTOBER TERM, 1949.

JAMES A. SULLIVAN,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF NEW YORK.

Petition for Writ of Certiorari to the Court of Appeals of the State of New York and for Stay of Execution of Judgment.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari to the Court of Appeals of the State of New York, being the highest court of the State of New York, be issued to review the final order and judgment of said Court (fols. 4069-4076), rendered and filed March 3, 1950 [upon which a final judgment was entered in the office of the Clerk of the County of Westchester on March 13, 1950—fols. 4078-4083], which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on June 20, 1949 (fols. 4048-4053), affirming a judgment of the Trial Court, the County Court of Westchester County, entered June 14, 1948 (fols. 124-128). Since March 15, 1950, petitioner has been serving the sentence (fols. 126-127, 3743-3744).

Statement of Case.

Petitioner was convicted May 17, 1948 (fols. 124-128, 3727-3729), upon an indictment charging (1) knowingly procuring or offering for filing in the office of the Clerk of Westchester County on June 4, 1945, of a false and forged certificate of doing business by Maritime Oil Company, which certificate, if genuine, might be filed there (§2051, Penal Law, McKinney's Con. Laws N. Y., v. 39, fols. 7-16; see §440, Penal Law); (2) forging the name of C. J. Arnold to the certificate (§887, *id.* sup., fols. 17-18); and (3) uttering said certificate by filing thereof (§881, *id.* sup., fols. 19-22). The verdict was several and not general (fols. 3727-3728).

The Trial Judge (fol. 60), before his elevation to the bench on January 1, 1946, by appointment of the Governor, was District Attorney of Westchester County (County Law, McKinney, v. 11, §230 [3], N. Y. Leg. Manual 1946, p. 1005, *id.* 1945, p. 658, County Law, §200 [1]). In November, 1946, he was elected County Judge (County Law, §230 [1], N. Y. Leg. Manual 1947, p. 993).

Having been attorney and counsel for the State in this case, he was disqualified to sit therein by §14 of the Judiciary Law (McKinney, v. 29). April 26, 1948, motion was made to withdraw a juror and to declare a mistrial, and denied, and jurisdiction retained despite the facts upon which the motion was made were admitted (fols. 59-60, 743, 745-755). The Trial Judge also denied a motion to inspect the Grand Jury minutes and disallowed a demurrer to the indictment (fols. 25-27, 31-54, 59).

The indictment is the result of an investigation begun in March, 1945 (fol. 749), by the Trial Judge, then District Attorney, and pursued by him for nine months, of an application for a telephone for Maritime Oil Company, made by one McGeory for Arthur Arnold who occupied

a room in the Labor Temple, Yonkers, as tenant of McGeory (fols. 1328, 1334, 1335; Exhibits 19, 20, fols. 3820-3828, 1359-1420, 1469-1479). As evidence that Maritime was doing business, the certificate was filed by someone not identified and a certified copy thereof left with the telephone company (fols. 259, 326, 816-818).

Reports of suspicion of the telephone company that the telephone would be used for bookmaking purposes were made to the District Attorney in April, 1945 (fols. 401-406, 1463-1465, 1473-1474, 392, 393, 402, 406, 416, 417, 421, 422, 423-425, 2419-2429, 211, 277-279). In addition, he also had the records of the telephone company (fols. 383, 384). On October 24, 1945, the District Attorney requested the telephone company to furnish him the name and address of the (*sic*) owner of the Ben Weiss telephone at 307 Walnut Street, Yonkers (Exhibit K, fols. 3964-3966, 2417, 2424, 2432, 2433-2435). That telephone was found in the room of Arnold, occupied by him as tenant of McGeory (Exhibit K, *supra*, fol. 1354: Exhibit 20, fols. 3826-3828, 639, 642-645, 656). Arnold had another man working with him (fols. 1412, 1445-1447; Exhibit J, fols. 3958-3960, 2421; Exhibit K, fols. 3964-3966, 2426-2434, 715, 731, 736-737).

Balog, chief factual witness for the State, signed the certificate, although he did not appear before or acknowledge it to the Commissioner of Deeds (Exhibit 23, fols. 3832-3834, 788, 866, 793-794). He was pretty sure that he took the certificate to the County Clerk, "it could not be otherwise" (fol. 795). He is unable to account for C. J. Arnold written by the Clerk on the back of the certificate, as the office practice is to ask for the name of the person presenting documents to be filed and to endorse the name thus given thereon (Exhibit 23, fols. 3832-3834, 961-962, 817-820). Then he recanted his testimony as to filing, stating the information that he had

filed it was given to him by the District Attorney (fols. 879-882, cf. 795). He testified before the councilmanic inquiry in Yonkers in July, 1947, but was not asked about the filing, and he testified before the Grand Jury in this case in October, 1947 (fols. 3716, 878-882). Then Balog recanted his recantation (fols. 938, 956-959). Therein lies perjury, and his impeachment, contrary to the statute (Code Crim. Proc., §8-a; Civil Pract. Act, §343-a). The second perjury (fol. 959) was admitted as clarification (fol. 959), which in the context is meaningless, for it is a flat, mendacious contradiction, under oath, taken from the quadripartite conference, which was not under oath, with the District Attorney, the witness, his wife and his attorney, before his Grand Jury appearance (fols. 879-882). Balog, obviously, was "refreshed" overnight (fols. 965-970, 974, 975). Balog received immunity for his testimony, and the District Attorney conceded that he was an accomplice (fols. 3523-3525, 3526, 882, 883, 3484).

Jurisdiction.

Jurisdiction of this Court is invoked under §1257 (3) of Title 28, U. S. C. A.

See also:

Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278, 284, *et seq.*
Screws v. U. S., 325 U. S. 91, 115, *et seq.*

Disqualification of the Trial Judge under §14 of the Judiciary Law was raised during the trial by motion to withdraw a juror and to declare a mistrial (fols. 745-755), and in the Court below assigned as error and deprivation of due process under the Fourteenth Amendment. Perjury and its use knowingly are manifest in the record, as is impeachment by the State of the crucial,

factual witness called by the State, contrary to the statutes. (§8-a, Code Crim. Proc.; §343-a, Civil Prac. Act.) Those questions were raised in the trial by objection and exception (fols. 957-960; cf. fols. 975, 815-819, 878-882, 961-962, 965-970, 974-975, 979, 3716), and by motions to dismiss (fols. 2396-2402, 3332), assigned as error below and as deprivation of due process under the Fourteenth Amendment.

Statutes Involved.

Judiciary Law of New York, §14, which provides in part:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel * * *"

Section 8-a of the Code of Criminal Procedure, provides:

> "In addition to impeachment in the manner now permitted by law, any party may introduce proof that a witness has made a prior statement inconsistent with his testimony, irrespective of the fact that the party has called the witness or made the witness his own, provided that such prior inconsistent statement was made in any writing by him subscribed or was made under oath."

Section 343-a of the Civil Practice Act is *in haec verba* as §8-a, C. C. P.

The addition mentioned in the opening sentence of §8-a, *supra*, is defined in *People v. Katz*, 209 N. Y. 311, 338; *People v. Jung Hing*, 212 N. Y. 393, 401, *et seq.*; *Crawford v. Nilan*, 289 N. Y. 444, 450, 451; *People v. Romano*, 279 N. Y. 392; *Matter of Roge v. Valentine*, 280 N. Y. 268, 276-277; *People v. Purtell*, 243 N. Y. 273, 280, 281; *People v. Robinson*, 273 N. Y. 438; *Bullard v. Pearsall*, 53 N. Y. 230; *Becker v. Koch*, 104 N. Y. 394, 401.

§399, Code of Criminal Procedure:

> "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

Questions Presented.

1. Jurisdiction of this case was lost by the County Judge because of the disqualification of the presiding Judge by §14 of the Judiciary Law. Retention of jurisdiction deprived petitioner: (a) of due process of law in that (1) he could, and did, not have a trial, let alone a fair trial; (2) rendered the proceedings *coram non judice* and a nullity; (b) of the equal protection of the laws; and abridged his right in this case to be tried in a court having jurisdiction in that he was forced by the State to try it in a court that lacked jurisdiction in this case. All in violation of his rights under the Fourteenth Amendment.

2. The judgment of conviction should not be permitted to stand resting, as it does, upon perjured testimony, knowingly used by the State, and material upon all counts of the indictment, depriving petitioner of due process under the Fourteenth Amendment.

3. Petitioner was deprived of due process and the equal protection of the laws in violation of his rights under the Fourteenth Amendment, in that, in violation of §§8-a and 343-a of the Code of Criminal Procedure and the Civil Practice Act, respectively, the chief factual witness, called by the State, was impeached by the State other than

by a statement subscribed by him or made under oath. Impeaching evidence was admitted (fol. 959, cf. fols. 795, 882), which under the rule (cases cited under statutes involved, *supra*, pp. 5, 6), stamped the witness impeached as an accomplice. But the Court later, in the charge to the jury, ruled complicity out as matter of fact and law (fols. 3691-3698, 3708). This is a deprivation of due process and equal protection of §399 of the Code of Criminal Procedure requiring corroboration of an accomplice.

Reasons Relied on for Allowance of the Writ.

Lack of jurisdiction in the Trial Court rendered the whole proceeding a sham and a nullity and the sentence of petitioner rises no higher.

Petitioner was denied due process of law, in that he could, and did, not have a fair trial or a trial at all. Also, he was denied the equal protection of the laws, in that cognate cases where the Trial Judge was disqualified, jurisdiction was held not to have attached, but otherwise in the case at bar. All in violation of his rights under the Fourteenth Amendment.

Judgment of conviction rests upon perjured testimony, knowingly used by the State in this case, which was necessary and material to conviction upon all counts of the indictment; in violation of petitioner's right to due process under the Fourteenth Amendment.

Petitioner was further deprived of due process and the equal protection of the laws in violation of his rights under the Fourteenth Amendment, in that, in violation of §§8-a and 343-a of the Code of Criminal Procedure and the Civil Practice Act, respectively, the chief factual witness of the State, called by it, was impeached by it, in a manner other than by a written statement subscribed by the witness or made by him under oath. And

was further deprived of due process and equal protection of the laws, in that the chief factual witness of the State was permitted to testify to facts which, under the law, stamped him indelibly as an accomplice (fol. 959; cases cited under statutes involved pp. 5, 6), and yet the Court charged the jury that the witness was not an accomplice as matter of fact or law (fols. 3691-3698, 3708).

Conclusion.

The writ should issue.

Respectfully submitted,

JAMES A. SULLIVAN,
Petitioner.

FRANCIS A. MCGURK,
Attorney for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1949.

JAMES A. SULLIVAN,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF NEW YORK.

Brief in Support of Application for Writ of Certiorari to the Court of Appeals of the State of New York and for Stay of Execution.

Opinions Below.

The Trial Court rendered no opinion, except a memorandum denying a motion to inspect the Grand Jury minutes and disallowing a demurrer to the indictment (fols. 52-54).

In the Appellate Division there were three memoranda opinions, one concurred in by three Justices and one each by two dissenting Justices (275 App. Div. 956; fols. 4060-4065).

The Court of Appeals rendered no opinion (300 N. Y. 696, fols. 4069-4076). On April 6, 1950, application for re-argument or to amend the remittitur was denied without opinion (300 N. Y. 739).

Jurisdiction.

See petition, pages 4 and 5, *supra*.

Specification of Errors.

It was error for the Trial Judge to have denied the application for a mistrial and to have retained jurisdiction after disqualification by §14 of the Judiciary Law had been raised and litigated on the trial, and the facts upon which the application was made had been admitted and affirmed after review below (fols. 745-755).

It was error to hold that petitioner had a trial by jury or even a fair trial as part of due process under the Fourteenth Amendment, a constituent part of the court, the presiding Judge, being disqualified; and that his right or privilege to a trial by a court having jurisdiction was not abridged in violation of his right thereto under the Fourteenth Amendment.

It was error to hold that petitioner was accorded equal protection of the laws under the Fourteenth Amendment, in that applicability of §14 of the Judiciary Law disqualified presiding Judges in cognate cases, but was denied to him.

It was error to hold that petitioner was accorded equal protection of the laws and due process under the Fourteenth Amendment in that, one Balog, chief factual witness for the State and called by it, was permitted to be impeached by the State (fols. 956-959 cf. 879-882), in a manner that violated §§8-a and 343-a of the Code of Criminal Procedure and the Civil Practice Act, and the impeaching testimony used as substantive evidence to convict.

It was error to hold that said Balog did not commit perjury in wilfully testifying falsely to a material fact, the filing the certificate (opp. p. 4, fols. 10-12, 795 cf. fols. 3716, 878, 882). Then to permit recantation thereof (fol. 959). And further, that said perjury was not coerced, and knowingly used, by the State.

It was error to hold that said Balog was not an accomplice whose testimony under §399 of the Code of Criminal Procedure had to be corroborated, and to have admitted his testimony upon the only theory upon which it could be admitted, which stamped the witness indelibly as an accomplice, and then, to instruct the jury that the witness was not an accomplice as matter of fact and law (3691-3698, 3708), thus depriving him of due process and the equal protection of the laws under the Fourteenth Amendment.

Summary of Argument.

Holding that having formerly been attorney and counsel for the State in this case did not divest the County Court of Westchester County of jurisdiction because of the disqualification of the Trial Judge by §14 of the Judiciary Law, obviously is important. The quest for jurisdiction must be found and settled at the outset of any trial, for it is the foundation upon which the Court may proceed to judgment. Lack of jurisdiction renders any trial a nullity. Disqualification, in this case, deprived the court of a constituent thereof, a Trial Judge.

In numerous prior cases, §14 of the Judiciary Law has been held to prevent jurisdiction from attaching. It could be raised at any time, is not waived and jurisdiction could not be conferred. The provisions of §14 are not rules of procedure and do not invest the Judge with discretion. They are a barrier to jurisdiction. This case plainly shows lack of jurisdiction and due process because thereof. By enforcing the law as it was enforced here, petitioner's right or privilege to be tried by a court having jurisdiction was abridged, and there was denied him equal protection of the laws.

The perjury here is manifest from the record, as is coercion, and the knowing use of testimony thus elicited, by the State. Conviction rests upon it as does the credibility of the perjurer. Without his testimony, the case of the State collapsed, for there is, without it, a palpable lack of evidence connecting petitioner with filing and uttering the certificate of Maritime Oil Company, charged in the first and third counts of the indictment; and the perjurer would not be credible as a witness upon the second count (cf. fols. 4064-4065).

Interlaced factually, though not legally with the perjury, is the impeachment of the perjurer and his complicity in the crimes charged. As to filing and uttering, reciprocal under the first and third counts of the indictment, the witness was never interrogated as to receiving the certificate to be filed, and its filing by him, before the perjury. He testified on cross examination that the information that he had *qua* filed the certificate was given to him by the District Attorney (fol. 882). That testimony is the gatepost of the perjury, the collapse of the case of the State, and the impeachment of the witness (fols. 957-958; cf. fol. 795). The following day, he was recalled by the State, ostensibly for another purpose than perjury (fols. 938-940), and while the witness did not deny in terms his previous testimony (fol. 882), he did in effect, with an avalanche of words (fol. 959) embodying in direct discourse what had been given him in indirect discourse by the District Attorney in rehearsing him for his Grand Jury appearance in this case (fols. 882, 878-881). Thereby he mendaciously, flatly contradicted his testimony at folio 882.

Prior to the trial in a city inquiry in Yonkers, N. Y. (fol. 794), where the witness was represented by his own attorney and since had been, he was not asked about filing the certificate (fol. 3716).

Overnight preceding the day of his recantation, he had spoken to four members of the staff of the District Attorney (fols. 965-970, 974, 975). It is obvious that he was "refreshed," coerced in the perjury, and it and the witness knowingly used by the State to accomplish the conviction. This is clearly lack of due process.

When he perjured himself, the witness was impeached (fols. 957-958). He had confessed under oath that he had made his own the answer given him by the District Attorney (882), which was unsubscribed and unsworn, and the impeaching evidence was elicited in violation of the statutes (§§8-a, Code Crim. Proc., and 343-a, Civ. Prac. Act). No mention is made of his having testified before the Grand Jury on the point (*cf.* fols. 953-954,957-959). That testimony would have been under oath, and competent if it existed in fact.

The Court charged that the witness was not an accomplice either as matter of law or fact (fols. 3691-3698, 3708). But, upon the only theory that the impeaching testimony could be admitted as evidence, namely, that he had made prior consistent statements when motives to falsify were not present, which is the addition to §§8-a and 343-a of the Code of Criminal Procedure and the Civil Practice Act, respectively, the witness is stamped as an accomplice (§399, Code Crim. Proc.), and must be corroborated. There is no showing that he made prior consistent statements, nor that he was actuated by any motives other than those that actuated him as far back as the summer of 1947 (fols. 878, 883-884). The impeaching testimony was unsubscribed and unsworn (fol. 959). Therefore, petitioner was deprived of due process, in that he did not have a fair trial and also was denied the equal protection of the laws, §§8-a, 399 and 343-a, *supra*. (See cases cited under statutes involved, *supra*, pp. 5, 6.)

ARGUMENT.

I.

The Trial Court lacked jurisdiction because the Trial Judge was disqualified by Section 14 of the Judiciary Law, having been attorney and counsel for the State in this case.

A. Importance of the question.

The instant case presents the quest for jurisdiction in a setting novel to this Court, although there is a cognate federal statute (U. S. C. A. Tit. 28, §455), and the question is of primary importance in the true administration of the law.

B. Exhaustion of State remedies.

The infirmities are not present here that appeared in *Ex parte Hawk,* 321 U. S. 114, *Hysler v. Florida,* 315 U. S. 411, and *Darr v. Burford,* 339 U. S. 200. This record manifests the errors, committed on the trial where they were litigated *coram judice* and reviewed below on appeal (*Paterno v. Lyons,* 334 U. S. 314, 318, 319). Neither error *coram nobis* nor *habeas corpus* is available here (*Hogan v. Genl. Sessions,* 296 N. Y. 1, 6; *People ex rel. Wachowicz v. Martin,* 293 N. Y. 361, 364, 366-367; *Matter of Morhaus, id.* 131). Unless this Court will intervene, petitioner is remediless.

C. Lack of jurisdiction in the County Court in this case.

General jurisdiction of the County Court under Section 39 of the Code of Criminal Procedure is not challenged. Its jurisdiction in this case is (*Sharkey v. Thurston,* 268 N. Y. 123, 126; *Johnson v. Zerbst,* 304 U. S. 458, 468;

Frank v. Magnum, 237 U. S. 309, 329; *Windsor v. McVeigh,* 93 U. S. 274, 282-283; *Ex parte Reid,* 100 U. S. 13, 23) because of Section 14 of the Judiciary Law, which provides in part:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel * * *."

In syncopated form, it appears first in Laws, New York, 1847, Chapter 280, Section 81 (2 R. S., 4th ed. 1852, p. 463, §8; Rev. Notes to Chap. III, tit. I, Laws N. Y. in 3 R. S. N. Y. 1828-1835, p. 694, §2).

It applies to civil and criminal cases (*People v. Haas,* 105 App. Div. 119, 120).

The Trial Judge (fol. 60) was District Attorney of Westchester County before his elevation to the bench by appointment of the Governor on January 1, 1946 (County Law, §230 [3], N. Y. Leg. Manual, 1946, p. 1005; *id.* 1945, p. 658). In November, 1946, he was elected County Judge (County Law, §230 [1], N. Y. Leg. Manual, 1947, p. 993).

Having raised the jurisdictional point which was litigated on the trial (fol. 754) and which could be raised at any time, is never waived and jurisdiction could not be conferred (*Baltimore Mail S. S. Corp. v. Fawcett,* 269 N. Y. 379; *Shea v. Export S. S. Corp.,* 253 N. Y. 17), nevertheless jurisdiction was retained over objection (fol. 754). The result is that the whole trial is *coram non judice, ab initio,* a fiction and a nullity (*Oakley v. Aspinwall,* 3 N. Y. 547; *Keefe v. Third Nat. Bank of Syracuse,* 177 N. Y. 305, 311, 313; *Sharkey v. Thurston, supra; People v. Haas,* 105 App. Div. 119; *Eugenie Loeb v. Nassau Electric R. R. Co.,* 240 App. Div. 912; *McLaren v. Charrier,* 5 Paige Ch. 530, 532; *People ex rel. Roe v. Suffolk Com. Pleas,* 18 Wend. 550; *People ex rel. Pond v. Trustees,* 4

App. Div. 399; *Darling v. Pierce,* 15 Hun 542; *Hubbell v. Harbeck,* 54 Hun 147; *Whitney v. Post,* 8 Paige Ch. 36; *Ten Eick v. Simpson,* 11 Paige Ch. 177; *Matter of Knickerbocker T. Corp. v. Sheila-Lynn, Inc.,* 172 Misc. 1015, affd. 259 App. Div. 992. See also: 56 Yale Law Jour. 605, 624, Apl., 1947; 15 Calif. Law Rev. 263 Mar., 1927; *Thellusson v. Rendlesham,* 7 H. L. Cas. 429, 430; *Lewis v. Branthwaite,* 2 B. and Ad. 437, 445).

D. Legal effect of retention of jurisdiction.

No man may be both accuser and judge (*Sharkey v. Thurston, supra; People v. Haas, supra*). Disqualification is not illusory. The statute should not be construed to defeat its purpose; nor may it be rationalized or oversimplified into a rule of procedure investing the Trial Judge with discretion to sit or not to sit (*Sharkey v. Thurston, supra,* p. 127; *People v. Patrick,* 183 N. Y. 52; cf. *Schneiderman v. U. S.* 320 U. S. 118, statement of Mr. Justice Jackson, p. 207). There is no *qua* prerogative (fol. 3416) involved. The Judge is not above the law. The statute is a substantive enactment and raises a jurisdictional barrier (*Wigand v. Dejonge,* 8 Abb. N. C. (N. Y.) 260; cf. *Zambetti v. Garton,* 113 N. Y. Supp. 804; *Snyder v. Massachusetts,* 291 U. S. 97, 105, 116).

Due process requires a judicial proceeding, not an assumption of authority (*McMaster v. Gould,* 240 N. Y. 379, 385; *Matter of City of Buffalo,* 139 N. Y. 422, 429, 430; *Wicks v. Monihan,* 130 N. Y. 232, 237, 238; *People v. Bork,* 96 N. Y. 188, 196; *People ex rel. Childs v. Extrady. Trial Term,* 228 N. Y. 463, 467; *Pennoyer v. Neff,* 95 U. S. 714, 733; *Twining v. New Jersey,* 211 U. S. 78, 110, 111; *Palko v. Connecticut,* 302 U. S. 319, 327; *Moore v. Dempsey,* 261 U. S. 86).

E. Right to trial by a competent court was abridged.

Disqualification of the trial judge left the Court without a constituent part in this case, the presiding judge (*People ex rel. Battista v. Christian*, 249 N. Y. 314, 319). The trial was a fiction and no trial at all (*Sharkey v. Thurston*, 268 N. Y. 123, 126, 127; *People ex rel. Battista v. Christian, supra*, p. 318; *People v. Rathbun*, 21 Wend. 509, 542). There was no one to preside, instruct the jury, receive the verdict and pass sentence, although it was passed (fols. 3473, 3474).

The trial judge was no less disqualified because he claimed lack of personal knowledge of the investigation of this case by his office or its result. Action by his staff is his own (*Keefe v. Third Nat. Bk. of Syracuse, supra*, p. 313; *Davis v. Seaward*, 85 Misc. 210, 222, 223; County Law, §§200 [4], 202; *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 93; *Fellows v. Mayor*, 8 Hun 484).

From the foregoing cases (cited under C *supra*, Lack of Jurisdiction in County Court, pp. 15-16), in which the jurisdictional bar embodied in Section 14 of the Judiciary Law is applied, there emerges a manifest discrimination between them and the case at bar, where application thereof was refused. The action of the County Court was State action through its constitutional court (N. Y. Const., Art. 6, §11), affirmed by its highest court (*Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278; *Neal v. Delaware*, 103 U. S. 370, 385-389; *Yick Wo v. Hopkins*, 118 U. S. 356; *Virginia v. Rives*, 100 U. S. 313, 318-322; *Ex parte Virginia, Id.* 339, 344-349; *Cassel v. Texas*, dec. April 24, 1950). Therefore, on this phase of the case, there is lack of equal protection of the laws.

II.

The judgment of conviction rests upon perjury, coerced and knowingly used, and should not be permitted to stand.

A. Importance of the question.

Perjury affects and corrodes the conviction here. This Court is ever sensitive and vigilant to strike it down, for it destroys the sanctity and binding character of an oath, which is the last means of preserving truth and faith among fellowmen in courts of justice.

B. Perjury was committed by the witness Balog.

It is clear that recanting the recantation is material and necessary to conviction. In fact, it supplies the only evidence of, and connecting petitioner with, the reciprocal charges of filing and uttering the certificate (fols. 879-882, 938, 956-962, 7-16, 19-22). To put it in perspective, we must go back to Balog's halting, direct testimony, indicating the contest in the forum of his conscience (fol. 795). He was never asked on his direct examination whether the certificate was returned to him after he signed it. The State glossed it over thus (fol. 796):

> "Q. Do you remember the time of day that you came up with them? A. Yes, it was my lunch hour."

He was never asked on re-direct examination (fols. 908-913) (*sic*), to clarify (fol. 959) his free and uncoerced testimony given the same day (fols. 882, 743). Recalled the day following, April 27, 1948, upon the State's representation that it was to ask him about some checks (fols. 938-939), he was then asked what bears the hallmark of coercion, and the real purpose was then revealed for his re-

call (fols. 951-959). Refreshing the witness about checks was not the purpose, which the Court refused to allow although within §8-a of the Code of Criminal Procedure (fols. 951-954). The witness could not be called hostile or confused (fols. 952-954). He was then to give his *quid pro quo* for his promised immunity (fol. 3484), namely, to testify falsely as to filing and uttering the certificate so that conviction might be had.

C. Perjury was coerced and knowingly used by the State.

Balog had given his testimony the day before, freely, truthfully and not under coercion (882, cf. 795). Overnight, when he saw and talked with four members of the staff of the district attorney, he was informed that he was to be recalled (*sic*) "to clear up a point" (fols. 965-970, 974, 975). There can be no doubt that he was told just what he was to say. Clearly, then, knowledge by the State is spelled out that the testimony was perjury, and that it was knowingly used in the trial. Balog was not asked at the Yonkers inquiry in July, 1947, about filing the certificate (fols. 878, 3716). He testified before the Grand Jury in this case in October, 1947 (fol. 879).

Before appearing before the Grand Jury, he conferred with the district attorney, and his wife and his own attorney were also present at the conference (fols. 879-882). He testified that, at the conference, the district attorney gave him the information that he, Balog, filed the certificate (fol. 882). He made that statement his own except that he did not put it into direct discourse, but into indirect (fol. 882). That was not what the State wanted of him, they wanted the statement, direct from him. He even failed them at first (fol. 795) and then he gave up the

truth (fol. 882). That testimony upset the plan of the State. It was not touched upon on re-direct until the next day after the State had "refreshed" him. Then under coercion, he toed the mark set for him. (Wigmore on Evidence, 3rd ed., §§1128, 1129). It is to be noted that Balog did not waive immunity (fols. 882, 883). He felt the State had enough evidence to indict him, which he wanted to avoid, and the State shared his views (fols. 883, 3525, 3526).

With the truthful and uncoerced testimony before the jury, the case of the State had collapsed (*cf.* fols. 4062-4065). But the victory was to be achieved the next day albeit the baser factors would be exposed, the perjury. Overnight, the coercion began and the next day it bore fruit (fol. 959). It came out, it will be noted, in a great expostulation, an avalanche of words, few of which are responsive to the question (fol. 959). This did not just happen. It is not accidental nor a coincidence. It is a plan, frustrated at first, but now worked and its object achieved. He was conceded to be an accomplice by the State (fols. 3525, 3526). The Court declined to charge that he was (fols. 3691-3692, 3695-3698, 3708).

The protestations of the State and Balog, do protest too much (fols. 980-984). They fail to cover the perjury, its coercion and knowing use thereof to convict, the evidence of which on this record is clear.

His filing the certificate is a myth. When he signed it, he did not read it (fols. 791, 870). But if he filed it, he must have read it, otherwise he would not have come by the name of C. J. Arnold, placed upon the back thereof by the clerk under his office practice (fols. 10-12, opp. p. 4, fols. 816-820, 961-962). If his cross examination on April 26, 1948, is true (fol. 882 *cf.* fol. 795), and he is vouched for by the State who called him, then he is plainly a perjuror (*U. S. v. Norris,* 300 U. S. 564; *People v. Gillette,* 126 App. Div. 665; *People v. Markan,* 123 Misc. 689;

Penal Law, §§1620 [1], 1620-a, 1622, 1624, 1626, 1627, 1627-a). It must be borne in mind that the case of *People v. Glass,* 191 App. Div. 483, was decided in 1908, and could not arise now because of the additions to the perjury statute in 1936 of §§1627 and 1627-a. The *Gillette* case turned, not on the fact of perjury, but upon the privilege of silence under the New York constitution (Art. 1, §6). But the commission of perjury is what we are concerned with, not its prosecution. Where there is a law against perjury, that will suffice to vitiate the judgment (*Mooney v. Holohan,* 294 U. S. 103). Perjury clearly emerges here, even under the criteria of the State and corrodes the judgment (*Mooney v. Holohan,* 294 U. S. 103; *Pyle v. Kansas,* 317 U. S. 213; *Hysler v. Florida,* 315 U. S. 411, 413).

III.

Balog, chief witness of the State, was impeached in violation of the statutes, and is also an uncorroborated accomplice, all of which leaves the verdict unsupported by evidence on the charges of filing and uttering, and goes to his credibility on all counts of the indictment.

A. Importance of the question.

The true administration of the law and the safeguarding of the right to a fair trial.

B. There is no substantive evidence of guilt of filing and uttering under counts first and third.

Impeachment rests upon the factual basis argued in Point II, *supra,* and is bound up in the recanting of the recantation (fols. 957-959 *cf.* fols. 795, 882). From im-

peachment on, we come logically and naturally to complicity.

Substantive evidence of guilt was removed by impeachment of Balog (*People v. Hagedorny,* 272 App. Div. 830; *People v. Sellinger,* 265 N. Y. 149, 154; *Hanrahan v. N. Y. Edison Co.,* 238 N. Y. 194; and see cases cited under statutes involved, *supra,* pp. 5, 6). Notwithstanding its removal from the case, there can be no doubt upon this record that it was considered by the jury and applied as substantive evidence of guilt. Upon to the time of impeachment, the State's case had collapsed, and made dismissal of counts first and third mandatory as matter of law (fols. 2396-2402, 3332).

C. The impeachment in this case was in violation of the statutory methods prescribed therefor.

Under §§8-a and 343a of the Code of Criminal Procedure and Civil Practice Act, respectively, a prior consistent statement may be shown, provided it was made at a time when the witness was not actuated by motives to shield himself. It does not include statements made out of court and not under oath, which is the case of Balog (*People v. Katz,* 209 N. Y. 311, 338, *People v. Edwards,* 282 N. Y. 413, 416, *Robb v. Hackley,* 23 Wend. 50; *Conrad v. Griffey,* 52 U. S. 480, and cases cited *supra,* pp. 5, 6, under statutes involved; fols. 879-882). While the Court ruled out complicity entirely on the facts and law (3691-3698, 3708), and the connection of Balog with the charges here is the same thing as his complicity therein (*People v. O'Neil,* 109 N. Y. 251, 267), then it must follow that the impeaching testimony (fol. 959), was admitted under the addition to §§8-a and 343-a, *supra,* which makes the verdict contrary to and inconsistent with the charge, and shows that the jury considered the evidence substantively in reaching it.

Balog was not a hostile witness (fol. 953, *cf.* fol. 959) and was actuated upon the trial by motives no different from those that actuated him in July, 1947 (fols. 878, 896, Wigmore Op. Cit. Sup. §§1128, 1129), when he knew of the imminence of things to come and when he was represented by his own attorney (fols. 831-833, 878, 879-880, 884-896, 898-899, 901-906, 954, 960-962, 965). His motives had not changed at the time of trial, except that he tried hard at first, to live up to the sanctity and binding character of the oath he had taken (fol. 795, *cf.* fol. 882). The evidence was not substantive proof under the circumstances here (*Bullard v. Pearsall, People v. Robinson, Matter of Roge v. Valentine, supra,* and cases cited under statutes involved, *supra,* pp. 5, 6).

D. Lack of due process and denial of equal protection of the laws because of impeachment.

Impeachment clearly emerges, even under the criteria of the State, and the use of such testimony as substantive evidence of guilt to convict. That is lack of due process and denial of the equal protection of §§8-a and 343-a of the Code of Criminal Procedure and Civil Practice Act, respectively, and the case law of the State as to the use of impeaching testimony (Cases cited under statutes involved, *supra,* pp. 5, 6; *Pennenkamp v. Florida,* 328 U. S. 331, 345; *Chambers v. Florida,* 309 U. S. 227, 239-242; *Ashcraft v. Tennessee,* 322 U. S. 143, 154-156; *Malinski v. New York,* 324 U. S. 401, 404, 406).

E. Denial of the equal protection of the laws, Section 399 of the Code of Criminal Procedure.

Petitioner did not have a fair trial because, as shown above, the impeaching testimony was admitted under the shibboleth of clarification (fol. 959), meaningless in the

context, but affording a fulcrum of excuse upon which to introduce the perjurious recantation (fol. 959 *cf.* fols. 939, 958).

Introduction of the impeaching testimony (fol. 959), leaves, however, a train of fatal and grave illegality. It could be admitted in no event unless it was written and subscribed by the witness or made by him under oath (§§8-a and 343-a Code of Crim. Proc. and Civil Prac. Act, resp. and cases cited under statutes involved, *supra,* pp. 5, 6). He never made a consistent prior statement. The district attorney did (fols. 879-882; see cases cited under statutes involved, *supra,* pp. 5, 6). None of the requisites is present (fols. 954-959). That is the only exception to the rule mentioned in those statutes. But, when thus admitted in evidence, it stamps the witness indelibly as an accomplice, and then he must be corroborated (§399, Code Crim. Proc.). But the Court ruled as matter of law and fact that Balog is not an accomplice (3691-3698, 3708). But the law irrevocably stamps him as one (cases cited under statutes involved, *supra,* pp. 5, 6). Therefore, the testimony is in evidence as coming from an accomplice; and between the charge and verdict of conviction, there is an antithesis or inconsistency that should not be allowed to stand, for it infects the verdict. It is tantamount to further impeachment by the Court itself (fols. 957-959, 3691-3698, 3708). It is a negation of the rule admitting the testimony. It is respectfully submitted that the jury considered the impeaching evidence and used it to convict. Uncorroborated as Balog now is, he must, although he cannot, be corroborated under §399 of the Code of Criminal Procedure. As to his filing and uttering the certificate, of necessity, he could not be corroborated (*People v. O'Neil,* 109 N. Y. 251, 267). Nothing that depends upon his credibility can corroborate him. None of the records can corroborate him, including the Mari-

time certificate (Exhibit 3, fols. 3760-3762, 229; Exhibit 26, fols. 3850-3852, 1270; Exhibit 23, fols. 3832-3834, 784; Exhibit 12, fols. 3802-3804, 436; *People v. Nuzzo,* 294 N. Y. 227, 234-235; *People v. Kress,* 284 N. Y. 452, 459, *People v. Swersky,* 216 N. Y. 471, 476; fols. 4064-4065; *People v. O'Neil, supra*). Nor could Balog's payment of $100 at the time of executing the application for the Maritime telephone corroborate him (Exhibit 3, fols. 3760-3764, 246-248). That alone would make him an accomplice (*People v. Swersky, People v. Kress, supra*).

CONCLUSION.

The writ should issue.

Respectfully submitted,

FRANCIS A. McGURK,
Attorney for Petitioner.

FILED
JUL 5 1950
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1949

No. 8[illegible]102

JAMES A. SULLIVAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE M. FANELLI,
District Attorney,
Westchester County,
County Court House,
White Plains, N. Y.

JOHN C. MARBACH,
Assistant District Attorney,
of Counsel, on the brief.

BURTON C. MEIGHAN,
Mamaroneck, New York,
of Counsel.

SUBJECT INDEX

PAGE

Proceedings Below 1

Nature of Case and Questions Presented 2

The Evidence 3

POINT I—The Trial Court Was Not Disqualified by Section 14 of The Judiciary Law of The State of New York 7

POINT II—The Claimed Perjury Was Merely A Correction of an Obvious Mistake and Was Not an Impeachment of The Witness 14

POINT III—The Witness Balog Was Not an Accomplice 21

POINT IV—No Substantial Question is Presented 22

POINT V—Conclusion 23

CITATIONS

Cases:

Bullard v. *Pearsall,* 53 N. Y. 230 .....18, 20, 21

Hickory v. *U. S.,* 150 U. S. 303 20

Keefe v. *Third National Bank,* 177 N. Y. 305 11

McLaren v. *Charrier,* 5 Paige Ch. (N. Y.) 530 12
Madden v. *Commonwealth of Kentucky,* 309 U. S. 803 23

PAGE

Miller v. *Sacramento etc. Drainage District*, 256 U. S. 129 22
Musser v. *State of Utah*, 333 U. S. 95, 98 23
Musser v. *Third Judicial District of Salt Lake County*, 106 Utah 373, 148 Pac. 2d 802, 803 11

Patterson v. *Colorado*, 205 U. S. 454, 460 23
People v. *Buchanan*, 145 N. Y. 1 19
People v. *Cohen*, 223 N. Y. 406, 424, 426 22
People v. *Haas*, 105 App. Div. (N. Y.) 119 12
People v. *Ibey*, 121 Misc. (N. Y.) 286 12
People v. *Purtell*, 243 N. Y. 273 20
People v. *Sullivan*, 275 App. Div. (N. Y.) 956 1
People v. *Sullivan*, 300 N. Y. 696 1
People v. *Sullivan*, 300 N. Y. 739 1
People v. *Youlio*, 243 N. Y. 519 22
People v. *Zigouras*, 163 N. Y. 250 20

Statutes:

Section 1257 (3) of Title 28 U. S. C. 22
Penal Law of New York, Section 381 1
Penal Law of New York, Section 887 1
Penal Law of New York, Section 2051 1
Code of Criminal Procedure (N. Y.), Section 344 ... 13
Judiciary Law of New York, Section 14 10

OTHER AUTHORITIES

Wigmore on Evidence, 3rd Ed., Vol. 3, Section 1044.. 17
Wharton's Criminal Evidence, Vol. 3, Sections 1336 & 1338 .....17, 18
48 *Corpus Juris Secundum* 1067 13

Supreme Court of the United States

OCTOBER TERM, 1949

No. 859

JAMES A. SULLIVAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Proceedings Below

The petitioner was convicted on May 17, 1948, in the County Court of Westchester County, of the crimes of (1) knowingly procuring or offering to be filed in the office of the County Clerk of Westchester County on June 4, 1945, a false and forged certificate of doing business under an assumed name (Penal Law § 2051), (2) of forging the name of C. J. Arnold to the same certificate (Penal Law § 887) and (3) of uttering the same forged certificate by the filing thereof (Penal Law § 881) (see *7-24, 124-128). The petitioner was sentenced on June 14, 1948, to a term of one year in the Westchester

* References are to folios of the printed record unless otherwise stated.

County Penitentiary on each count to run concurrently and in addition was fined the sum of $1,000 on the first count.

The conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department on June 20, 1949 (4048-4053, 275 App. Div. 956 opinion at 4060-4065). It was finally affirmed by an unanimous order and judgment of the Court of Appeals on March 3, 1950 (4069-4076, memorandum opinion at 300 N. Y. 696). On April 6, 1950, the Court of Appeals unanimously denied an application by the petitioner for a reargument or in the alternative to amend the remittitur so as to state a Federal question (300 N. Y. 739).

The petitioner is presently serving his term and in the ordinary course will be discharged on or about September 14, 1950.

Nature of Case and Questions Presented

James A. Sullivan, the defendant, was the Vice-Mayor of the City of Yonkers, New York, and a member of its Common Council in June of 1945. Arthur Arnold was a bookmaker, who occupied a room in premises controlled by the defendant and who needed an extra telephone for that illegal business. Wartime restrictions required that telephone service be given only to legitimate businesses, and the telephone company required evidence of a going concern, registration papers, and a bank account. The defendant forged the fictitious name of "C. J. Arnold" to a certificate of doing business under the assumed name of Maritime Oil Company, and caused it to be filed in the office of the County Clerk of Westchester County on June 4, 1945, and also opened a bank account for the Maritime Oil Company, to induce and procure the installation of the telephone for the bookmaker.

The main question presented here is whether the failure of the trial court to disqualify himself deprived the petitioner of equal protection of the laws. Petitioner also claims that one of the witnesses for the People committed perjury and was an accomplice and that the use of such testimony brought about a conviction without due process and denied petitioner equal protection of the laws.

The petitioner in his petition and supporting brief has misrepresented and distorted the evidence before the trial court. It will be necessary, therefore, to review the evidence in order that the points involved may be judged in their proper light of the reasonable interpretation of the testimony and of the Jury's rejection of that interpretation which the petitioner puts upon the testimony.

The Evidence

The defendant, James A. Sullivan, had been a man of power and influence in the City of Yonkers from 1920 and was a member of its Common Council during the period 1944 to 1947 (2531-2547). An attorney had purchased for him as a business venture the controlling mortgage interest in premises known as the Labor Temple in the City of Yonkers as part of a plan to rehabilitate the premises for a possible resale (1070-1074). The interest was taken in the name of the attorney's secretary as a dummy for the defendant (People's Exhibit 32, 1013-1017). A friend of the defendant's, one William J. McGeory, had formerly been president of the holding corporation which had legal title to this building (1050-1053), but the taxes on the property had been in arrears since 1936 and an assignment of rents had been made giving the mortgagee the right to manage the premises (1058, People's Exhibit 34, 1011). In the purchase of the mortgage the defendant succeeded to all of the rights given by this assignment of rents. McGeory had no in-

dividual interest in the property (1091-1095). The actual control and management was in the hands of the defendant from October 1944 (1013-1017).

About this same time McGeory brought to this building a bookmaker by the name of Arthur Arnold and showed him a room in which Arnold might possibly work and have some phones (1340-1351). Two phones were installed on these premises on October 17, 1944 and the defendant came and facilitated their installation (492-503). This bookmaker from then until after the date of the forgery of June 4, 1945, was the tenant of the defendant Sullivan and not, as the brief of the petitioner has claimed, the tenant of McGeory (see petition at p. 3). Rents were collected by the "dummy" and turned over to the defendant Sullivan until foreclosure of the premises in July 1946 (1018-1025, 1118-1131).

In the spring of 1945 the bookmaker wanted an additional phone and spoke with the defendant and McGeory about getting a phone (1362). This meeting was staged because it was necessary for the defendant, the man with influence, to take the bookmaker to meet a telephone company representative (1368-1374). The defendant had previously attempted in other ways to obtain this telephone. He had written two letters, on February 24th, 1945 and again on March 26th, 1945 on stationery of the fictitious Maritime Oil Company to each of which the defendant had signed the name "S. P. Fisher" (338, 344, see People's Exhibits 10 and 11 at 3791, 3797). The first of these requested telephone service and the second gave additional information in the effort to obtain the telephone. The defendant had also twice called the district manager of the telephone company and asked him to expedite the installation of the phone (330-339).

During this time the matter of this application was referred by telephone to the district attorney's office on

April 13th, 1945, apparently to see if the persons were known, but no answer or report was received from the district attorney's office (421-425).

On April 26th, 1945 the defendant brought the bookmaker Arnold to lunch with a Mr. Prokop, manager of the local office of the telephone company (213-215). At this conference Mr. Prokop indicated that the telephone company would want evidence that the concern was operating, of a bank account, registration papers or anything similar and the defendant was present when this was made known (221, 222, 285-291, 309-318). The bookmaker testified that he had never seen the letters sent out on the stationery of the Maritime Oil Company and did not know a "S. P. Fisher" (1406, 1407).

John J. Balog was a clerk in the Coal company, who kept records, wrote letters and had worked in the same office for over ten years with the defendant who was some kind of a superior in the firm and who on occasion had given orders concerning his work to Balog (765-772). Balog was a low salaried man and the defendant had on occasion obtained extra clerical work for him which had stopped at the end of May, 1945 (859-865). Then on June 4th, 1945 the defendant Sullivan brought to Balog a certificate of conducting business under the name of Maritime Oil Company and at the defendant's request he signed his name as "J. J. Balog" on the original and two copies (787, 791). The defendant Sullivan said to Balog that a friend of McGeory's was going into business and that there was a chance for Balog to obtain some additional work (792). Balog did not know McGeory and had never talked to him (3319) but he had faith and full confidence in the defendant Sullivan and went along with what Sullivan asked him to do (870-871). Balog then, at the request of the defendant took these papers to the county clerk's office and brought certified copies back to the defendant (795, 872-878, 813-819).

On June 8th, 1945 a checking account was opened in the name of this fictitious Maritime Oil Company with a deposit of $1,000 in cash and the caption thereon was in the handwriting of the defendant Sullivan (1273-1277, 1663). Balog had also signed other papers for the defendant, and the telephone company application and a portion of the bank signature card were in his handwriting (800, 246, 906).

The defendant also hired Helen P. Balog, the wife of John J. Balog on June 11th, 1945, to work in a store at the premises controlled by him until the telephone was installed and she did remain there until a few days after the installation, during which time no business was done in the store and the only persons who came in were the defendant Sullivan, the telephone installer and an unknown man looking for business (914-935, 506-509).

This telephone of the Maritime Oil Company thus secured by the defendant and installed in the store on the ground floor was thereafter used by the bookmaker in his room on the third floor of the building (1385-1390). The wiring used to extend the phone was not material used by the telephone company (538).

After the City of Yonkers had acquired the premises after a tax lien foreclosure, a reporter for the local newspaper was making a survey of the progress in the conversion of the building for quarters for veterans and on February 12th, 1947 this reporter discovered the telephones and had then called the police (2439-2448).

The defendant admitted writing the name of "S. P. Fisher" on the letters of the Maritime Oil Company to the telephone company and also making the bank deposits and hiring Mrs. Balog to stay in the store to await the installation of the telephone but all of this he claims was done in reliance on authorization given to him by his

friend McGeory (2623, 2646, 2654). He denied writing the signature "C. J. Arnold" which was the forgery charged in the indictment (2487).

The defendant also admitted having in his hands the certificates and asking Balog to sign them with the hope of some work for Balog but again said that he had done this at the request of McGeory (2636-2643). The defendant also denied that he had given the certificate to Balog to file in the county clerk's office (2644). The People showed by competent handwriting experts, based upon authentic specimens of the defendant's handwriting, that the defendant had signed the forged signature (1494, 1989). The defendant also offered expert testimony to the effect the evidence was insufficient to indicate that the defendant had written the signature (2901-2933). The factual issue was settled by the verdict of the jury and is not an issue before this Court.

ARGUMENT

POINT I

The trial court was not disqualified by Section 14 of the Judiciary Law of the State of New York.

The trial judge had been district attorney prior to January 1, 1946. There is no disagreement on that fact but there is an unqualified denial that this judge had been counsel or attorney "in this case".

On page 2 of the petition a statement of fact is made that the trial judge as district attorney began an investigation and pursued it for nine months into the matter of this application for the phone by the Maritime Oil Company. All of the folios cited show clearly that the inves-

tigation was by the telephone company alone. There is one reference to Defendant's Exhibit F at 414 which would indicate that reports were made to the district attorney but this reference is a mistake in reading for the exhibit itself at 3941 shows very clearly that the report was made to the district manager of the telephone company and not to the district attorney's office.

This same argument was made by this counsel upon the oral argument to the Court of Appeals and he was questioned extensively about this folio reference and about the fact that they are set forth in such a manner as to misrepresent the record. He nevertheless repeats now the same argument despite the fact that twelve judges in the appellate courts of the State have unanimously held that this interpretation of the facts and this attempt to make the judge an attorney and counsel in the case, which did not exist until more than thirteen months after the trial judge ascended to the bench, is without merit.

Counsel for the defendant asked the district attorney to produce upon the trial a telephone company record of a call made to the district attorney's office, which apparently was an inquiry by the telephone company about a telephone of the Maritime Oil Company, on April 13, 1945 (422, 423). Apparently no answer was made by that office. It should be pointed out that at that time there was merely in existence two letters written to the telephone company bearing the two fictitious names of "C. J. Arnold," and "S. P. Fisher" and also the certificate involved in this indictment was not filed until June 5, 1945. There was no evidence that any record was made by anyone in the district attorney's office or any emphasis placed upon this telephone call and this is not surprising because it would be impossible for any office to have any information in its files about non-existent persons.

The defendant's counsel also asked the district attorney to produce Defendant's Exhibit "K" which referred to the fact that the district attorney's office had requested the name and address of the subscriber of the Ben Weiss telephone (2418)

The district attorney's office was never informed that this telephone was being used for bookmaking nor was there any indication that the district attorney had any proof at that time that the telephone was being used for such a purpose (2427). The petitioner has argued in his brief that this man Ben Weiss was known to the district attorney to be the other man who worked with the bookmaker, Arnold, but the district attorney's attempt to inquire into the identity of Ben Weiss in Yonkers was objected to by defendant's counsel at the trial (2452). All of the exhibits relating to any contact with the district attorney's office had been used in the councilmanic inquiry in Yonkers and all bear the exhibit number used in that hearing. That fact was brought out by the district attorney in the argument on this question.

Defendant's counsel moved the disqualification of the trial judge after the trial had been on for one week (732, 60) upon the ground that he was the district attorney in 1945 and that at that time his office was asked for information regarding the Maritime phone and also requested information regarding the Ben Weiss installation (748). It was not claimed at that time or at any time by the trial counsel that the trial judge had any knowledge personally about those matters. The district attorney pointed out that all of these exhibits and their contents were known to Mr. Bleakley, the trial counsel, before the trial started and they were a part, not only of the stenographic minutes but also of the police report, both of which were in defendant's counsel's hands before the trial started (751-752). The statement of fact was then made by the district attorney conducting the trial

that it could not be shown that the trial judge ever knew about any of these things (753). The motion to disqualify was denied and the court declined to make a statement on the record as to his lack of knowledge. It is submitted that as a matter of law the fact of these casual inquiries is not sufficient to disqualify the trial judge. There was no knowledge of bookmaking on his part in 1945 or on the part of anyone else in the district attorney's office. No information charging a crime was being prepared or was filed, nor were any proceedings shown to be then pending before the grand jury, and these exhibits which were used as the basis of the motion did not become known until 1947, more than one year after the trial judge became County Judge, and the telephone company records turned over to the Yonkers police. While these exhibits were in the possession of the district attorney at the trial they were not turned over to him until after they had been used upon the hearing in Yonkers (2417). Petitioner's attempt to charge that reports were made to the trial judge back in 1945 are supported by folio references which relate merely to the fact that they were in the possession in 1948 of the district attorney at the trial (383, 384, 2417). Particular reference is made to Defendant's Exhibit "K" which went to the office of the telephone company and not to the district attorney at that time (2436-2437).

Section 14 of the Judiciary Law insofar as pertinent here provides as follows:

> "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested." • • •

The charges here were forgery and uttering of a forged instrument and the filing in a public office of the instru-

ment concerned. There is no claim that the facts concerning the forgery by the defendant and the use of the assumed business name certificate were known to anyone until after the police investigation started in February of 1947, more than one year after the trial judge had ceased to be the district attorney. Since the crimes charged were not under investigation prior to January 1, 1946, then the judge could not be disqualified (see *Musser* v. *Third Judicial District Court of Salt Lake County*, 106 Utah 373, 148 Pac. 2d 802, 803). The indictment was not voted until November 20, 1947 (25).

Since there was not during 1945 any action taken in the name of the People against the defendant or anyone else involved in this case, there was not at any time while the trial judge was district attorney any "action, claim, matter, motion or proceeding" in which he was or acted as attorney or counsel within the provisions of Section 14 of the Judiciary Law. There is no "claim" here and the other words relate strictly to judicial proceedings or actions, either civil or criminal, and since there were none the court is not disqualified as a matter of law (see *Keefe* v. *Third National Bank*, 177 N. Y. 305).

Trial counsel conceded that the judge had no personal knowledge—compare this to petitioner's claim of an investigation directed by him.

> "Ladies and Gentlemen: In this part of my summation, among other things, I am going to discuss the District Attorney's Office in 1944 and 1945, and I think it only fair to tell you that the District Attorney in 1944 and 1945, was his honor, Elbert T. Gallagher. *I do not claim and will not claim that Judge Gallagher had any knowledge* of the things I am going to call to your attention, but in fairness to myself and in fairness to the defendant, I think I should say to you that when this situation began to

develop early in the trial I did not realize that Judge Gallagher had been District Attorney at that time. As soon as I did realize it I called the facts to his attention and Mr. Fanelli's attention, and I asked Judge Gallagher to disqualify himself. It was his prerogative to do so or not. He did not do so. As I say, and I want to make it perfectly clear, I make no accusation against Judge Gallagher, but I definitely am going to call the facts, the undisputed facts here to your attention" (3415, 3416). (Italics supplied.)

It cannot be claimed that the trial judge is interested within the meaning of the Judiciary Law. He obviously has no longer any connection with the district attorney's office, and mere former association is not the concrete type of interest contemplated by the statute. The judiciary law contemplates such a direct interest as is illustrated in *People* v. *Ibey,* 121 Misc. 286, where the judge at the time of the trial was an employee of the company which owned the stolen truck which was the very subject of the larceny charge being tried.

The instant case is to be distinguished in every respect from the situation presented in cases cited by petitioner. An analysis of two of them would illustrate this difference. *People* v. *Haas,* 105 App. Div. 119, reversed an order denying a motion to remove the trial to the Supreme Court. In that case, the County Judge had prior to his election, consulted with the accomplice of the defendant and had also interviewed the defendant in jail while the indictments were pending. The defendant, in his affidavit, claimed that he had considered the Judge as counsel in his own case. *McLaren* v. *Charrier,* 5 Paige Ch. 530, is cited by the petitioner at page 15. It involved a master who had represented a party and an examination of the report shows that this was not another case

but a supplemental bill and a continuation of the same case in which the master had previously acted as counsel and had assisted in preparing papers in the case.

We will not burden the court with an analysis of every case cited, but none of them refer to any situation similar to the instant case. Most of the cases cited by petitioner at pages 15 and 16 may be found as footnotes to the discussion at 48 *Corpus Juris Secundum*, page 1067, and relate chiefly to situations in which the judge, while prosecuting attorney, had actively participated in the investigation or had signed the indictment or information under which the defendant was charged in the trial before him.

Although both the defendant and his attorney were in possession of the complete stenographic minutes of the hearing in Yonkers where all of these telephone company records were produced prior to the opening of this trial before the County Court, the defendant's attorney was not apprehensive that he might not receive a fair trial, for he did not attempt to move under Section 344 of the Code of Criminal Procedure to remove the case to the Supreme Court for trial because the judge was biased or prejudiced.

It may be wondered, however, why trial counsel who conceded that the judge had no knowledge of these facts discussed them at such length before the jury. He did so solely in an attempt to divert attention from his own client and to make a baseless and despicable charge that the alleged inaction resulted from bribery by the bookmaker of the sheriff or the district attorney (3420).

The trial court, therefore, is not disqualified under the provisions of Section 14 of the Judiciary Law because no court action or proceeding was pending against the defendant while the Court had been district attorney and neither is there shown any personal bias or prejudice which would prevent a fair trial.

POINT II

The claimed perjury was merely a correction of an obvious mistake and was not an impeachment of the witness.

The witness John J. Balog had testified on direct examination that at the request of the defendant he took to the county clerk's office and filed there the original certificate of conducting business under an assumed name, and also that he returned two certified copies to the defendant. On cross examination he gave further details of the route he took and the particular building in which the office was located (872-878). Cross examination then brought up the details of an interview had by the witness Balog with the district attorney, Mr. Fanelli, prior to the appearance of the witness before the Grand Jury. According to stenographic records, the witness testified as follows:

> "Q. Mr. Fanelli, in the presence of your lawyer, yourself and your wife, talked to you about the filing of these exhibits in White Plains? A. He did.
>
> Q. Do you recall what he said to you on that subject? A. He gave me the information that I filed it" (882).

If this testimony were in fact given by the witness it would contradict all of his direct testimony relating to the filing of the instrument which was the subject of the indictment, and all of the other details given by him on cross examination. The record does not show that the defendant's attorney seized upon this apparent contradiction or followed up any line of questioning to enlarge upon this statement. The following day, as a part of the re-direct examination of this witness, his attention was directed to the answer which the record showed he had given. He was plainly surprised that the record did

show such an answer and expressed his surprise in a rising tone and appropriate inflection which is reflected in the record by the question mark at folio 957. The complete context of the questioning on this point, is as follows (954):

"Q. Yesterday on cross-examination Mr. Bleakley asked you about conversations between you, your lawyer Mr. Hand and myself prior to your appearance before the Grand Jury; do you remember that? A. Yes, I do.

Q. What questions were asked you about that subject? A. Did I at any time talk to you before I testified before the Grand Jury?

Q. I do not want you to repeat them, but you do recall Mr. Bleakley asking you some questions as to what I said to you before you appeared before the Grand Jury? A. Yes, I believe he did ask me something about—

Q. Do not state the question; do you remember the subject matter which was discussed on your cross-examination by Mr. Bleakley when he questioned you about that yesterday? A. Yes, something about my testimony.

Q. Yes; yesterday morning or yesterday afternoon Mr. Bleakley asked you this question: 'Q. Mr. Fanelli, in the presence of your lawyer, yourself and your wife talked to you about the filing of these exhibits in White Plains? A. He did'; do you recall that? A. Yes.

Q. And then was this question put to you yesterday: 'Q. Do you recall what he said to you on that subject'— Do you remember that question? A. Yes.

Q. And did you give this answer: 'A. He gave me the information that I filed it'; do you remember making that answer? A. That you gave me the answer that I filed it?

Q. Did you make that answer yesterday; I will repeat it again: 'A. He gave me the information that I filed it'; do you remember making that answer yesterday? A. I must have it if it is in the record.

Q. If you made that answer what did you mean by it?

Mr. Bleakley: Now, if your honor please, I object to counsel trying to impeach his own witness, contradict the testimony that he gave yesterday.

Mr. Fanelli: I am not trying to do that; this is something that I had omitted to ask him about. I had a note on it and my assistants tell me that that was not the answer that was made yesterday; they have their notes and I want to clear it up.

Mr. Bleakley: It is funny we heard the testimony as he read it and obtained a copy of it from the stenographer within 15 minutes after the answer was given.

The Court: I will permit you to clarify it.

Mr. Bleakley: I respectfully except.

Mr. Fanelli: And that is my only purpose, to clarify it.

Q. If you made that answer, what did you mean by it? A. I mean that I know that you asked me did I file the certificate and I told you that I did and you also asked me did I sign the certificate and I told you I did; you did not tell me that I filed it.

Q. That is what I want to bring out. Did I at any time— A. No, you did not at any time tell me that I filed the certificate."

The reading of this excerpt shows plainly that the witness' attention was merely called to an answer he had given on cross examination and he was given an opportunity to clear up his apparent contradiction brought

out on the cross examination. By his own testimony on the witness stand the witness then proceeded to correct what was recorded as his testimony and to give what he now says is the truth about the same matters on which he had been cross examined.

This method of questioning is held proper by all the authorities, and no case that the petitioner cites applies to this situation.

The principle as set forth in Wigmore on Evidence, 3rd ed. Vol. 3 at page 737, is as follows:

> "§ 1044. In general. In accordance with the logical principle in Relevancy (ante, § 34), the impeached witness may always endeavor to explain away the effect of the supposed inconsistency by relating whatever circumstances would naturally remove it. The contradictory statement indicates on its face that the witness has been of two minds on the subject, and therefore that there has been some defect of intelligence, honesty, or impartiality on his part; and it is conceivable that the inconsistency of the statements themselves may turn out to be superficial only, or that the error may have been based not on dishonesty or poor memory but upon a temporary misunderstanding. To this end it is both logical and just that the explanatory circumstances, if any, should be received."

To the same effect is the statement of the rule in Wharton's Criminal Evidence in Vol. 3, Section 1336 at page 2216:

> "If a witness is prejudiced before the jury by testimony developed on his cross-examination, he may, on re-examination, remove the unfavorable impression by pertinent explanation."

And also at Section 1338, page 2218:

> "* * * So, a witness may, at the discretion of the court, be permitted to return to the stand after dismissal, to correct or change testimony previously given by him through error, mistake, or oversight, even before the close of the examination in chief."

The cases cited by the petitioner correctly state the general propositions of law that a party may not impeach his own witness by proving through another witness that the impeached witness had made a prior contradictory oral statement, or the situation where the People introduces evidence of oral statements to corroborate testimony of a witness on the stand where no attack upon the witness has been made upon the ground that his testimony is of recent contrivance.

Petitioner has cited at pages 5 and 23, the case of *Bullard* v. *Pearsall,* 53 N. Y. 230. An examination of this case points up the differing situation and announces the rule which is properly applicable to permit the examination of the witness, which was had in this case. The court there distinguishes between calling to the witness' attention previous statements made by him and the proof of such prior oral statements by other witnesses if the impeached witness should deny making the previous statements. The court said in part, at 53 N. Y. 231:

> "It is only evidence offered for the mere purpose of impeaching the credibility of the witness, which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken and to induce him to correct his evidence, should not be excluded simply because they may result unfavorable to his credibility."

The rule is obviously even stronger in favor of admissibility where as in this case the witness is not confronted with a previous oral statement and asked whether he made such a statement but where the portion of his cross examination is recalled to him and without being confronted by the extra-judicial statement, he corrects the recorded testimony on cross examination and affirms on the witness stand that the answers he now gives are a true statement of the facts. It was the defendant's counsel who first inquired into the subject of the pre-grand jury conference, and it was proper to clear up any misunderstanding about the testimony relating to the same subject matter.

In *People* v. *Buchanan*, 145 N. Y. 1, the court discussed the proper rule applicable to the re-direct examination of a witness who has been questioned on cross examination about previous oral statements. This was a murder case and the witness testified as to the health of the deceased but was cross examined as to the details of the conversation he had had with the coroner, including questions relating to the existence of a Will or a suggested use of poison. On re-direct examination he was asked to give the conversation that he had had with the coroner. This re-direct examination is held proper and the court states the general rule applicable to the instant case at 145 N. Y. 24, as follows:

> "If the defendant chose to open an inquiry as to a conversation between the witness and the coroner, it was proper enough and just that the jury should be placed in possession of what the conversation actually was. I understand the rule to be that a witness may be re-examined by the party calling him upon all topics on which he has been cross examined, for the purpose of explaining any new facts which came out; but the re-examination must be confined to the subject matter

of the cross examination. He may be questioned to show the meaning of his expression, or of his motive in using them (1 Starkie on Evid. *208; Clark v. Vorce, 15 Wend. 193, 196). Even if the cross examination has been as to facts not admissible in evidence, the rule seems to be that the witness may be re-examined as to evidence so given (1 Greenl. on Evid. sec. 468; 2 Phillips on Evid. *973; Blewett v. Tregonning, 3 Ad & El. 554.)"

The rule is also illustrated in *People* v. *Zigouras,* 163 N. Y. 250, where it was held that the same principle is applicable to re-direct examination of witnesses for the defense. On cross examination, the People had brought out that one of the defense witnesses had had some trouble with the deceased. Re-direct examination was permitted to explain what the trouble was. The court stated at 163 N. Y. 255, that the explanation might "have restored the direct evidence to its original force, and possibly have increased its force."

A discussion of only one of the cases cited by petitioner should be helpful in illuminating the different factual situation in the instant case. In *People* v. *Purtell,* 243 N. Y. 273, a witness failed to identify a defendant, and the District Attorney cross-examined him regarding the previous statements he had made. The witness, however, denied that he had made certain remarks to the defendant which would throw some light upon the certainty of his prior identification. The District Attorney was permitted to call a detective to show what the witness had actually said to the defendant at the time of the prior identification. The court holds improper, the use of this detective to testify as to the previous oral statement of the witness. But it cites *Bullard* v. *Pearsall, supra,* and also to distinguish between the situation in the *Purtell* case itself, the court also cites at 243 N. Y. 281, *Hickory*

v. *U. S.*, 150 U. S. 303, for the same rule that respondent has previously quoted from *Bullard* v. *Pearsall, supra;* that a witness may be interrogated as to previous statements in order to induce him to correct his testimony. If Balog had persisted on re-direct in stating that the District Attorney had told Balog that Balog has filed the certificate then, of course, any previous oral statement to the contrary would have been inadmissible, and his sworn testimony before the Grand Jury would have been the only method of impeachment. The witness, however, made the correction himself and he had not been in any way prompted nor had he known before being recalled to the stand what the subject matter and the questioning was to be other than there was a point to be cleared up (966-969). The claim of "coaching" is without any basis.

The court's ruling permitting clarification of the matters brought out on cross examination was proper.

POINT III

The witness Balog was not an accomplice.

Again this same argument was considered by the Court of Appeals and the petitioner's position here was unanimously rejected.

The witness Balog had been asked to sign his name by the defendant Sullivan who had already signed the fictitious name of "C. J. Arnold" (2641). The petitioner's counsel conceded at the trial that Balog was not an accomplice on the second count of the indictment which charged forgery (3333). On the other two counts, the uttering of a forged instrument and the filing instrument to be false and forged, there is no evidence in the entire record that Balog had any guilty knowledge of the fact that the defendant had committed a forgery. In all cases in the State of New York a person cannot be an accom-

plice unless he could be found guilty if he were on trial for the crime charged against the defendant (*People* v. *Cohen,* 223 N. Y. 406, 424-426; *People* v. *Youlio,* 243 N. Y. 519).

A claim is made throughout the petition and the supporting brief (see p. 4) that the district attorney at the trial had conceded that Balog was an accomplice but again the folios cited merely show the district attorney had said that the witness Balog committed no crime because the witness had signed his own name and was merely a tool of the defendant Sullivan (3523-3526, 882-883), and for some reason the petitioner cites folio 3484 as proof that the witness Balog was given immunity but it is clear that the reference there is to the bookmaker Arnold and not to Balog.

POINT IV

No substantial question is presented.

Respondent respectfully submits that the petitioner was convicted after a trial in which his guilt "is palpable and convincingly established in this record" (4062), and that petitioner's claims of error cannot be upheld. But even if the Courts of New York State had somehow departed from the precedents established, there would be no constitutional question presented but merely an affirmance of the conviction by the highest court which involved the construction and the application of the statutes of the State of New York to the facts in this record.

Jurisdiction of this court is invoked under § 1257 (3) of Title 28, U. S. C. A. The court has no jurisdiction where a fictitious federal question is involved (*Miller* v. *Sacramento, etc. Drainage Dist.,* 256 U. S. 129). Petitioner's argument in substance is that the New York Court of Appeals is wrong, and that the court acted con-

trary to its own previous decisions. Such an argument presents no question reviewable by this court (*Patterson* v. *Colorado,* 205 U. S. 454, 460). Petitioner does not attack the validity of the state statutes, but merely their construction by the highest state court as applied to these facts, and this court will not review that construction (*Musser* v. *State of Utah,* 333 U. S. 95, 98; *Madden* v. *Commonwealth of Kentucky,* 309 U. S. 83).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE M. FANELLI,
District Attorney,
Westchester County,
County Court House,
White Plains, N. Y.

JOHN C. MARBACH,
Assistant District Attorney,
of Counsel, on the brief.

BURTON C. MEIGHAN,
Mamaroneck, New York,
of Counsel.

June , 1950.

Office - Supreme Court,
FILED
SEP 7 1950
CHARLES ELMORE

Supreme Court of the United States

No. 102.

October Term, 1950.

JAMES A. SULLIVAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

REPLY BRIEF OF PETITIONER.

FRANCIS A. MCGURK,
Attorney for Petitioner,
42 Broadway,
New York City.

THE REPORTER COMPANY, INC., New York City—1950

Index.

	Page
Statutes	i
Table of Cases	ii
Other Authorities	ii
Argument:	
I. The case is not moot	1
II. Inaccuracies and statements *dehors* the record in brief of respondent	3
III. Respondent's concession of its own contradiction of its own witness, Balog	5

STATUTES:

Alcoholic Beverage Control Law, §110, §126(1)	2
Civil Practice Act, §374-a	3, 4
Civil Practice Act, §587	2
Civil Service Law, §14 (4)	1
Code of Criminal Procedure, §375	2
Election Law, §152 (2)	2
Executive Law, §116 (3)	2
General Business Law, §74 (2)	2
Penal Law, §2 (2)	1
Penal Law, §2182	1
Penal Law, §2444	2

CASES:

	Page
Fiswick v. U. S., 329 U. S. 211	2
Johnson v. Lutz, 253 N. Y. 124, 126, *et seq.*	4
Morrison v. California, 291 U. S. 82	4
People v. Abramowitz, 132 Misc. 18	2
People v. Bellinger, 269 N. Y. 265	1
People v. Buchanan, 145 N. Y. 1	5
People v. Cornell, 65 Misc. 452, affd. 138 App. Div. 915	2
People v. Hughes, 137 N. Y. 29	1
People v. Kress, 284 N. Y. 452	4
People v. Miller, 196 N. Y. Supp. 904	2
People v. Mullens, 292 N. Y. 408	4
People v. Pearsall, 53 N. Y. 230	5
People v. Razezwicz, 206 N. Y. 249	4
People ex rel. Rodenberg v. Warden, 154 App. Div. 473	1
People v. Rubin, 286 N. Y. 56	4
People v. Zigouras, 163 N. Y. 250	5
St. Pierre v. U. S., 319 U. S. 41	2
Tot v. U. S., 319 U. S. 463	4

OTHER AUTHORITIES:

3 Opinions State Comptroller (N. Y. 1947) 161	2

Supreme Court of the United States

OCTOBER TERM, 1950.

JAMES A. SULLIVAN,
Petitioner,
vs.
THE PEOPLE OF THE STATE OF NEW YORK.

REPLY BRIEF OF PETITIONER.

This reply is filed under Rule 38, §4 (a) of the Rules of this Court, to show that petitioner was not accorded a fair trial.

On July 26, 1950, petitioner's application for a stay of execution and enlargement on bail was denied by Mr. Justice Burton without opinion.

Petitioner will have served his sentence before the Court reconvenes.

I.

The case is not moot.

Petitioner is convicted of three felonies (Penal Law, §2 [2]; *People v. Bellinger,* 269 N. Y. 265, 269; *People v. Hughes,* 137 N. Y. 29, 34; Penal Law, §2182; *People ex rel. Rodenberg v. Warden,* 154 App. Div. 473), and discharge from prison will not end his punishment. Under the New York law, if such conviction is upheld by this Court, it will entail continuing civil disabilities, e. g., rejection for a civil service appointment on the basis of conviction alone (Civil Service Law, §14 [4]); as a witness in a civil or criminal case, weight of his testimony

may be affected (Penal Law, §2444); in a criminal trial, he is subject to challenge as a juror (Code Crim. Proc., §375); loss of right to vote which can be restored by grace of pardon of the governor or by certificate of the board of parole (Election Law, §152 [2]). In default of a pardon, granting of certificate by parole board is discretionary and may not be sought short of five years after release or termination of sentence (Executive Law, §116 [3]; Resp. Br. p. 2). He may not be licensed as a private detective or investigator, nor be employed by either (General Business Law, §74 [2]); he may not be licensed to sell alcoholic beverages (Alcoholic Beverage Control Law, §110, §126 [1]).

Conviction on the first count entails a fine of $1,000 which must be paid to obtain release or time served in lieu of payment thereof (fol. 126). Hence, if this Court takes jurisdiction the recapture of the fine, if paid, remains (Civ. Prac. Act, §587; *People v. Cornell,* 65 Misc. 452, affd. 138 App. Div. 915; *People v. Abramowitz,* 132 Misc. 18; *People v. Miller,* 196 N. Y. Supp. 904; 3 Op. State Compt. [N. Y. 1947] 161). Whether time is served or fine is paid, the case is not moot.

Therefore, under the doctrine of this Court in *St. Pierre v. U. S.,* 319 U. S. 41, and *Fiswick v. U. S.,* 329 U. S. 211, 221-223, the case is not moot.

II.

Inaccuracies and statements *dehors* the record in the brief of respondent.

The statements on pages 7 and 8 that petitioner constructs his argument that the Trial Judge was disqualified on Exhibit F, is not the fact. There is no argument addressed to that exhibit, nor is it referred to, in the brief of petitioner; nor are folios 414 and 3941 mentioned in the petition, brief or argument.

The argument on pages 4, 6 and 8 concerning the so-called S. P. Fisher letters, omits to state that they are not substantive proof of guilt and are not to be so used. The Court so charged (fols. 3634, 3635). In view of the verdict, there can be no reasonable doubt that they were used as substantive evidence of guilt. But that instruction, it will be noted, covers a larger area than the Fisher letters. It includes the "surrounding circumstances." They include the following exhibits: 1 (fols. 3748-3750, 186, 191), 2 (fols. 3754-3756, 197-198, 207, 272), 3 (fols. 3760-3762, 225, 229), 4 (fols. 3766-3768, 232, 236), 5 (fols. 3772-3774, 239, 242), 7 (fols. 3778-3780, 253-258, 444), 8 (fols. 3784-3785, 324-327), 9 (fols. 3786, 259, 261), 13 (fols. 3808-3810, 448, 450), 14 (fols. 3814-3816, 446-447), 20 (fols. 3826-3828, 635, 626, 639), 25 (fols. 3844-3846, 790, 1293-1295, 1132, 1294). Of them, Exhibits 1, 2, 4, 5, 13 and 14 refer to the telephones of the Democratic Club, which is clearly not in issue here, not even as evidence of plan and design, nor as an attendant circumstance (fols. 3634-3635). The balance refers to Maritime Oil Company. All, excepting No. 20, were produced by the telephone company as its own records, and were admitted in evidence under §374-a of the Civil Practice Act, subject to being connected. But none of them was, any more than was Exhibit 23 (fols. 3832-3834, 784), which was ad-

mitted with the same qualification (fol. 784), which, too, was never met (Main brief, Points II and III). Moreover, Exhibits 8, 9 and 25, were not presented to the telephone company by petitioner nor by anyone at his instigation (fols. 2652, 2829-2831). On Counts one and three, the verdict could not have been reached unless the jury surmised such connection.

Coming to the statute, §374-a, *supra,* it appears to be a modification of the shop-book rule, but its purpose has not been changed (*Johnson v. Lutz,* 253 N. Y. 124, 126 *et seq.*). Nor, in a criminal case, as it was here, can it be used to hypothesize guilt (*People v. Rubin,* 286 N. Y. 56, 59). These are not only legal errors, properly addressed to an appeal (*People v. Mullens,* 292 N. Y. 408, 418), but in the context and setting of this case go farther, and deprive petitioner of due process (*Tot v. U. S.,* 319 U. S. 463, 468-470; *Morrison v. California,* 291 U. S. 82, 90, 91). Whatever probative value the exhibits have under the statute, *supra,* rests in pyramiding inference upon inference (*People v. Razezwicz,* 206 N. Y. 249, 270, 271).

Testimony of the witnesses Garrity and Hudak, do not connect petitioner with the crimes. Their acts were not authorized by petitioner (*People v. Kress,* 284 N. Y. 452, 464). The testimony of the former is included between pages 334 and 370 and the latter between pages 370 and 377, of the record.

The argument on page 8 that there is a lack of evidence of a record in the office of the district attorney of facts connected with the investigation, and on page 11 that the crimes charged were not under investigation prior to January 1, 1946, and that no action was taken by the district attorney in 1945, are all *dehors* the record. As to the latter, Exhibit K (fols. 3964-3966) is dated August 9, 1945, near the top thereof, and at the bottom

appears the date of October 26, 1945. Therefore, in 1945, there was activity by the district attorney as that exhibit discloses. As to the former, the Trial Judge admitted the existence of the factual basis of the motion to disqualify (fol. 755). Therefore, the State, to protect the jurisdiction of the County Court, should have produced the records or offered evidence of them. It did not accept that proper burden. To have done so, would have flown in the face of the undisputed testimony. It is also *dehors* the record where it is argued at page 11, that the crimes charged are not shown to have been known to anyone until after February, 1947, and were not under investigation prior to January 1, 1946. The respondent knows better than that (fols. 749-750). The reasons given above apply to the argument at page 11.

III.

Respondent's concession of its own contradiction of its witness, Balog.

This refers to page 14, that the testimony of Balog that he was given the information by the district attorney that he had filed the Maritime certificate contradicts all of his direct testimony in all of its details, if that testimony were given. The record speaks for itself and certification thereof attests its verity. The testimony was clearly inadmissible as substantive evidence of guilt (*Bullard v. Pearsall,* 53 N. Y. 230, 232). The *Zigouras* and *Buchanan* cases, cited at pages 19 and 20, are clearly to be distinguished. In them the matter upon which the witnesses were permitted to be recalled and examined, pertained to new matter brought out on cross examination, that is, the opposing party had made the witnesses his own, which is not the instant case. Cross examina-

tion here was aimed at the direct examination and the concession concedes it so to have been. The contradiction of the witness is not inferential but direct.

Respectfully submitted,

FRANCIS A. McGURK,
Attorney for Petitioner,
42 Broadway,
New York, N. Y.